APPENDIX A

United States Court of Appeals
Fifth Circuit
FILED
July 24, 2007
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-10048
Summary Calendar

OSCAR LOPEZ,
Plaintiff-Appellant,

versus

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Texas, Abilene
No. 1:05-CV-00137

Before JONES, Chief Judge, and REAVLEY and PRADO, Circuit Judges.
PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appellant Lopez challenges the district court's calculation of his award for attorney's fees under the Equal Access to Justice Act. We affirm.

The district court awarded attorney's fees at the rate of $140.00 per hour, a rate the Magistrate Judge determined was reasonable and appropriate in the Abilene Division to ensure adequate representation for those who need it, as required by 28 U.S.C. § 2412(d)(2)(A)(ii). Appellants contend that the court abused its discretion because all attorneys should be reimbursed using the statutory cap of $125.00 per hour, adjusted by the national Consumer Price Index for All Urban Customers ("CPI-U"). This method would produce a fee of $156.25 per hour.

This court rejected a similar argument in *Yoes v. Barnhart*, 467 F.3d 426 (5th Cir. 2006), concluding that rate uniformity is not required even across a single district: "[R]ate disparities between courts serving two different markets is more than reasonable; indeed, it is expressly contemplated by the Act itself." *Id.* at 427. The district court did not err by refusing to apply the CPI-U, and the rate awarded here is more generous than that in *Yoes*.

Under the abuse of discretion standard, *see Baker v. Bowen*, 839 F.2d 1075, 1082 (5th Cir. 1988), we cannot say that $140.00 per hour, $15.00 per hour higher than the statutory cap, does not adequately provide for representation in Abilene. Accordingly, the district court's order awarding attorney's fees and costs is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

OSCAR LOPEZ,	§	
Plaintiff,	§	
v.	§	
Jo Anne B. Barnhart,	§	Civil Action No.
Commissioner of Social	§	1:05-CV-137-C
Security	§	ECF
Defendant.	§	

ORDER

COMES NOW BEFORE THIS COURT Plaintiff's Motion for District Judge's Assistance in Perfecting Appellate Jurisdiction, filed with this Court on November 17,2006. Plaintiff appears to be requesting that this Court make a ruling on Plaintiff's Objection to Hourly Rate Found by Magistrate Judge, filed November 14, 2006. This Court had construed Plaintiff's Objection as a motion for relief. Thus, this Court referred Plaintiffs Objection to the Magistrate Judge on November 16,2006. The Magistrate Judge treated Plaintiffs Objection to Hourly Rate as a motion for relief from judgment under Rule 60(b) and found that Plaintiff was filing such objection "[t]o the extent that formal objection is necessary to preserve error." (Mag. Order dated Nov. 16,2006 (quoting Plaintiffs Mot.)). Plaintiff then filed his Motion for District Judge's Assistance, arguing that this Court was required to rule upon his Objection rather than refer it to the Magis-

trate Judge as a motion for relief from judgment. This Court will now rule on Plaintiffs Objection.

Plaintiff specifically objects to the hourly rate for attorney's fees which the Magistrate Judge found was appropriate in this matter. Plaintiff argued that pursuant to *Baker v. Bowen*, 829 F.2d 1075, 1084 (5th Cir. 1988), the appropriate hourly fee is the same fee applicable to the Dallas Division. As succinctly put by the Magistrate Judge's November 16,2006 Order, "[t]his exact issue was recently addressed by the Fifth Circuit, examining an EAJA fee award out of the Abilene and San Angelo Divisions of the Northern District of Texas at the rate of $132.50 per hour." (Mag. Order dated Nov. 16,2006 (*citing Yoes v. Barnhart*, 467 F.3d 426,427 (5th Cir. 2006). As already noted by the Magistrate Judge in his Order, "[t]he Fifth Circuit found that this court's determination of the appropriate hourly rate, which reflected the location of the court, did not constitute an abuse of discretion, noting *Baker* 'did not mandate rate uniformity across the entire federal district however.'" *Id.*

Here, the Magistrate Judge determined that $140.00 per hour was reasonable and appropriate in the Abilene Division to ensure adequate representation for those who need it and to minimize the costs of the representation to taxpayers. (Mag. Orders dated Nov. 1, 2006 and Nov. 16, 2006.) This determination was based upon the Fifth Circuit's reasoning in *Yoes*, 467 F.3d at 427, and upon the Magistrate Judge's own knowledge. *Id.* This Court carefully reviewed the record in this case and the Magistrate Judge's well-reasoned and thorough analysis contained in the November 1,2006 Order and finds no error. The Fifth Circuit has spoken on this precise issue and Plaintiffs

arguments are foreclosed.[1] Plaintiffs Objection is OVERRULED.

SO ORDERED this 5th day of December, 2006. *

[signature]

SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

---

[1] In *Yoes v. Barnhart*, 467 F.3d 426,427 (5th Cir. 2006), the Fifth Circuit found that $132.50 per hour in attorney's fees for San Angelo and Abilene adequately provided for representation. Therefore, the Magistrate Judge's determination that $140.00 per hour ($7.50 more) would also necessarily be adequate.

APPENDIX C

OSCAR LOPEZ,	§	
Plaintiff,	§	
v.	§	
Jo Anne B. Barnhart,	§	Civil Action No.
Commissioner of Social	§	1:05-CV-137-C
Security	§	ECF
Defendant.	§	

ORDER ON PLAINTIFF'S MOTION FOR RELIEF FROM ORDER

THIS MATTER is before the court upon Plaintiffs Objection to Hourly Rate Found by Magistrate Judge filed November 14,2006 (Doc. 41), which this court treats as a motion for relief from judgment or order under Fed. R. Civ. P. 60(b). This motion was referred to the United States Magistrate Judge on November 16,2006 (Doc. 42). In his motion Plaintiff argues that the United States Magistrate Judge erred in determining the appropriate hourly rate of attorneys fees awarded under the Equal Access to Justice Act ("EAJA").

Plaintiff indicates that he files such objection "[t]o the extent that formal objection is necessary to preserve error." The fee application was referred to the United States Magistrate Judge for determination, as a non-dispositive matter. Plaintiffs appeal of this determination would be directly to the United States Court of Appeals for the Fifth Circuit, rather than by objection to the United States District Judge. Therefore, the court treats this as a motion for relief from judgment or order.

Pursuant to Fed. R. Civ. P. 60(b), the court may relieve a party from a final judgment, order, or proceeding (1) for mistake, inadvertence, surprise, or excusable neglect; (2) for newly discovered evidence which could not have been discovered by due diligence; (3) for fraud; (4) because the judgment is void; (5) because the judgment has been satisfied, released, or discharged; or (6) for any other reason justifying relief from the operation of the judgment. Here, Plaintiff asks that the court reconsider the attorney fee award, arguing that the court applied incorrect law in making the award.

Plaintiff specifically objects to the hourly fee which the court found was appropriate in this matter. Plaintiff argues that pursuant to *Baker v. Bowen*, 839 F.2d 1075, 1084 (5th Cir. 1988), the appropriate hourly fee is that which is applicable to the Dallas Division. This exact issue was recently addressed by the Fifth Circuit, examining an EAJA fee award out of the Abilene and San Angelo Divisions of the Northern District of Texas at the rate of $132.50 per hour. *See Yoes v. Barnhart*, 2006 U.S. App. LEXIS 25007, 2-3 (5th Cir. October 5,2006). The Fifth Circuit found that this court's determination of the appropriate hourly rate, which reflected the location of the court, did not constitute an abuse of discretion, noting that *Baker* "did not mandate rate uniformity across the entire federal district however." *Id.* The Fifth Circuit further opined that "[a]lthough rate fluctuations among federal courts serving the same city are arbitrary, the same rate disparities between courts serving two different markets is more than reasonable; indeed, it is expressly contemplated by the Act itself." *Id.* While this is an unpublished opin-

ion, *Yoes* remains persuasive and instructive because it deals with the specific issue raised by Plaintiff in his objection.

Plaintiff also argues that there is no evidence in the record to support the hourly rate finding. However, the court found that "the appropriate rate in this case in the Abilene Division of the Northern District of Texas 'to ensure adequate representation for those who need it and to minimize the costs of the representation to the taxpayers" pursuant to Baker is currently $140.00 per hour.'" This is based on the court's own knowledge, and was also upheld by the Fifth Circuit in *Yoes. Yoes,* 2006 U.S. App. LEXIS 25007 at *4. Having carefully considered Plaintiffs objection, the court nevertheless concludes that the hourly rate awarded was appropriate. Therefore, Plaintiff is not entitled to relief from the Order on Plaintiffs Motions for Attorneys' Fees entered on November 1,2006.

DATED this 16th day of November, 2006.

[signature]

PHILIP R. LANE
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

OSCAR LOPEZ,	§	
Plaintiff,	§	
v.	§	
Jo Anne B. Barnhart,	§	Civil Action No.
Commissioner of Social	§	1:05-CV-137-C
Security	§	ECF
Defendant.	§	

ORDER ON PLAINTIFF'S MOTIONS FOR ATTORNEYS' FEES

THIS MATTER is before the court upon Plaintiff's Application for Attorney Fees Under the Equal Access to Justice Act ("EAJA") filed September 22,2006 (Doc. 31), Plaintiff's Motion to Enlarge Time to File a Motion for Attorneys' Fees Under Section 406(b) of the Social Security Act filed September 6,2006 (Doc. 28), and Plaintiffs Motion for Reconsideration and/or Relief from Order Denying Plaintiffs Motion to Enlarge Time to Seek Attorneys' Fees Under Section 406(b) of the Social Security act filed October 12, 2006 (Doc. 38). Defendant filed her response to the application for attorney fees under the EAJA on September 27,2006 (Doc. 33), and Plaintiff filed his reply on October 10, 2006 (Doc. 37). The United States District Judge referred these motions to the United States Magistrate Judge on September 25,2006 (Doc. 32), and on October 13, 2006 (Doc. 39), for a hearing, if necessary, and for determination.

In his application Plaintiff seeks an award of attorneys fees pursuant to the EAJA for 54.9 hours at the rate of not less than $156.25 per hour, for a subtotal of $8,578.12, plus court costs in the amount of $250.00, for a total amount of $8,828.12.

U ıder the Equal Access to Justice Act (the "EAJA"), a party in a civil suit brought by or against the United States is entitled to recover attorney's fees from the United States if four requirements are met: 1) the party is the prevailing party, 2) the party files a timely fee application, 3) the position of the government was not substantially justified, and 4) no special circumstances make an award unjust. 28 U.S.C. § 2412(d)(l)(A)-(B). Defendant does not oppose an award of attorney's fees to Plaintiff in this case but argues that the claim for fees is excessive and should be reduced.

The Defendant argues that the 54.9 hours requested is excessive, noting that of that total, 46.9 hours was spent on drafting Plaintiffs opening brief. The Defendant further argues that the hours submitted included work which did not require an attorney's expertise, including 0.30 hours "for supervising of filing of federal complaint" and "for supervising service of summons and Complaint to Defendants." Defendant argues that the 2.25 hours for reviewing the Appeals Council decision is not compensable, as Plaintiff's complaint was not filed until July 19,2005. Defendant argues that the 0.45 hours claimed for requesting extensions of time would defeat the purpose of the EAJA.

In his reply, Plaintiff argues that the number of hours expended was reasonable because his case was not "non-complex." Plaintiff notes that the results

achieved demonstrate the reasonableness of the fee as well as the high stakes to Plaintiff (as his insured status had expired before the ALJ issued his decision), his transcript was 479 pages in length, and his brief was "more detailed than usual" and involved at least eight discreet and potentially reversible errors, including two unusual legal issues. Plaintiff argues that the 2.25 hours spent studying and reviewing the Appeals Council decision was reasonable. Plaintiff asked for an additional 4.8 hours of fees at the rate of $156.25 for replying to the Defendant's response.

A. Appropriate Rate for Attorney's Fees Award

Plaintiff asks for attorney's fees computed at the rate of $156.25 per hour. For the computation, Plaintiff used the data published by the U.S. Bureau of Labor Statistics for the consumer price index (the "CPI") in the Dallas-Fort Worth area for Urban Wage Earners and Clerical Workers. To determine the increase in the cost of living, Plaintiff compares the CPI for April 1996 with the average of the CPIs for July 2005 and July 2006. The Supreme Court recognized in *Pierce v. Underwood*, 487 U.S. 552, 571-74 (1988) that any adjustment made under the EAJA as the result of an increase in the cost of living is made to the statutory cap. The Court, in reviewing the special factors provision of the EAJA, excluded the cost of living provision from its review and referred to any cost of living adjustment, separately, as the '$ [125] cap (adjusted for inflation)." 487 U.S. at 571-74. The Fifth Circuit has also held that an adjustment for inflation is appropriately applied to the rate of the statutory cap. *Hall v. Shalala*, 50 F.3d 367, 370 (5th Cir. 1995). Thus, upon the receipt of proper proof of an increase

in the cost of living, the court should make an appropriate adjustment in the statutory cap.

The EAJA does not specify any particular method or any particular data to use for computing the increase in the cost of living. This court has previously determined, however, that the most appropriate CPI data for the computation is data that is most applicable to the area in which the court is located.

The statutory fee cap itself, of course, applies universally. One could thereby argue that cost of living adjustments should be made using data that applies to the nation as a whole. On the other hand, the EAJA provides that fees "shall be based upon prevailing market rates for the kind and quality of the services furnished . . . ." 28 U.S.C. 6 2412(d)(2)(A). The Fifth Circuit in discussing the cost of living factor refers to "the cost of living . . . in a particular locale" and "the cost of living index for the geographical area." *Baker v. Bowen*, 839 F.2d 1075, 1084 (5th Cir. 1988). The Fifth Circuit further stated in *Baker* that it is clear that the cost of living affects each litigant within the Dallas Division to the same degree. This factor requires a uniform determination in order to avoid a multiplicity of conflicting views among the Dallas courts. *Id.* at 1083. As to cost of living increases, the Fifth Circuit instructed the Dallas courts to determine a uniform rate that would be applied in all fee awards in the Dallas Division until uniformly changed by a later court order. *Id.* at 1085. The references to the "prevailing market," "a particular locale," and "the geographical area," and the requirement in *Baker* for uniform treatment of adjustments to the cap for cost of living increases in the Dallas Division, when considered together, seem to require that cost

of living adjustments be based on the data for only one location. The only data that would provide the required uniformity in *Baker* was the data applicable to the Dallas area. The same is true for the Abilene Division or any other area; uniform results in adjusting the cap in a specified area can only be obtained from data covering that area, irrespective of where an attorney lives or has his or her primary practice.

The Fifth Circuit makes it clear in *Hall* that a district court may determine that a fee based on a rate below the adjusted statutory cap "is a reasonable attorney's fee award based on the facts of a particular case." 50 F.3d at 370. It is not necessary "that attorneys' fees awards track the cost-of-living index for the geographical area.... [R]ates should be increased only to the extent necessary to ensure an adequate source of representation...." *Baker*, 839 F.2d at 1084. The EAJA "serves a dual purpose: to ensure adequate representation for those who need it and to minimize the costs of the representation to taxpayers." *Id.* at 1083. This court is required to determine the fee award in this case based on a rate within the adjusted cap that is reasonable, that minimizes the cost to the taxpayers, and that does not exceed the amount necessary to ensure an adequate source of representation in this court.

Plaintiff argues that "[t]here is no good reason for the court's desire for uniformity to be limited to a particular judicial division or city, particularly given the regional, even nationwide nature of the disability appellate practice." Pl. Appl. at 7. However, this court finds that the appropriate rate in this case in the Abilene Division of the Northern District of Texas "to ensure adequate representation for those who need it

and to minimize the costs of the representation to the taxpayers" pursuant to *Baker* is currently $140.00 per hour. This is an increase in the uniform rate that the court has previously determined to be reasonable and appropriate in the San Angelo and Abilene Divisions. The court finds that a further increase in the rate at this time is not necessary to ensure an adequate source of representation. *See id.* at 1084.

Based on Plaintiffs calculations, the court does not dispute that the rise in the cost of living may justify an adjustment to the statutory attorney's fee cap above $140.00 per hour. In its discretion, however, for the reasons stated above, the court does not approve of the Plaintiffs request for attorney's fees based on a rate above $140.00 per hour.

B. Reasonableness of the Hours Requested

Plaintiff seeks an award of attorneys fees for 54.9 hours of attorney work. Defendant argues that this does not represent a reasonable number of hours and takes issue with 3 hours of the 54.9 hours requested.

"The typical EAJA application in social security cases claims between thirty and forty hours." *Hardy v. Callahan*, No. 9:96-CV-257, 1997 WL 470355 (E.D. Tex. Aug. 11, 1997) (citing a lengthy list of cases in support). However, the court acknowledged in *Hardy* that the case was typical. The "case did not involve any particularly complex factual issues, and the medical evidence was for the most part straightforward and understandable. The legal issues were not difficult, nor were they matters of first impression." *Id.* at 9.

Plaintiff argues that this case was not "non-complex" and argues that his attorneys achieved ex-

cellent results, the stakes were high, and his transcript was 479 pages. Plaintiff also argues that his brief was more detailed than usual and addressed specific issues which were time-consuming and record-intensive.

The court has carefully reviewed the arguments of the parties, as well as the itemized list of attorney hours expended provided by the Plaintiff. While Defendant argues that the 2.25 hours expended reviewing the Appeals Council decision is not compensable, Plaintiff correctly notes that the review of this decision and consideration of the viability of this case on appeal to the United States District Court was not a part of the administrative proceeding but was necessary to prepare for the drafting of the complaint in this case. Therefore, the court finds that this amount of time was reasonable.

While Defendant argues that the 0.3 hours expended in supervising the filing of the complaint and the service of the summons was "clerical" in nature and not compensable at the attorneys fees rate, the court notes that Defendant does not suggest a more appropriate rate and the amount of time sought is reasonable for attorney oversight of such matters.

Although Defendant argues that the 46.9 hours expended to prepare the Plaintiffs brief was excessive, the court has carefully reviewed the extremely detailed, itemized description of these hours spent, as well as the brief itself, and finds that, given the specific legal issues raised in the brief and the fact and record-intensive nature of the brief and the arguments, the amount requested is not excessive. The court is also mindful of Plaintiffs assertion that his

attorney had expended additional hours which were pared from the request.

Defendant also takes issue with the 0.45 hours of fees expended in seeking two extensions of time. The court finds that the 0.25 hours expended in seeking the second extension of time are not reasonable, given that the Second Motion for Extension of Time was denied as moot. The court finds that the 0.20 hours expended in drafting the first Motion for Extension of Time and Order is, however, reasonable, particularly in light of the fact that the Defendant also sought an extension of time prior to agreeing to the remand. Therefore, 0.25 hours should be subtracted from the hours sought by Plaintiff.

Therefore, the court finds that an award of 54.65 hours of attorneys fees is reasonable at the rate noted above, which represents Plaintiffs original request for 54.9 hours, reduced by the 0.25 hours expended in seeking the second extension of time.

C. Plaintiffs Request for Additional Fees

Plaintiff seeks an award of an additional 4.8 hours expended in drafting the reply to the Defendant's response to his application for attorneys fees. The court finds that Plaintiffs request for an additional 4.8 hours of attorneys fees for litigation over the fee is well-taken and should be granted at the hourly rate discussed previously in this order.

D. Plaintiffs Request for an Award of Costs

The court further finds that Plaintiffs request for an award of costs for filing fees of $250.00 is appropriate and should be granted.

E. Plaintiffs Motion to Enlarge Time and Plaintiffs Motion for Reconsideration

In Plaintiffs motion to enlarge time to file a motion for award of attorney's fees and expenses filed September 6,2006 (Doc. 28), Plaintiff asked for additional time to file an application for attorneys' fees pursuant to Section 406(b) of the Social Security Act. The court denied this motion as moot. Plaintiff filed a motion for reconsideration on October 12,2006 (Doc. 38)' which this court treats as a motion for relief from judgment or order under Fed. R. Civ. P. 60(b). The court finds that Plaintiffs motion for reconsideration is well-taken and should be granted and that Plaintiff should be permitted an extension of time to file any application for attorney's fees pursuant to Section 406(b) of the Social Security Act as set forth below.

IT IS THEREFORE ORDERED:

1. Plaintiffs motion for reconsideration filed October 12, 2006 (Doc. 38), is **GRANTED;**

2. Plaintiffs motion to enlarge time to file a motion for award of attorney's fees and expenses filed September 6, 2006 (Doc. 28), is **GRANTED**. Plaintiff shall have thirty (30) days from the determination by the Social Security Administration of the administrative fee to which Plaintiffs counsel may be entitled to file a motion for attorney's fees under Section 406(b) of the Social Security Act with this court;

3. Plaintiffs application for attorney's fees under the EAJA filed September 22,2006 (Doc. 31), and his supplemental request for attorney's fees (as set forth in his reply) is **GRANTED IN PART**. Plaintiff is awarded 54.65 hours of attorney's fees plus an additional 4.8 hours for litigating the fee petition, for a

total of 59.45 hours of attorneys fees at the rate of $140.00 per hour or $8323.00 (or 59.45 X 140) plus $250.00 for costs, for a total of $8573.00, made payable directly to Gal Lahat, attorney for Plaintiff.

DATED this 1st day of November, 2006.

[signature]

PHILIP R. LANE

UNITED STATES MAGISTRATE JUDGE